INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	15
Appendix A (opinions of the Court of Claims)	17
Appendix B (statute and regulations)	26

CITATIONS

Cases:

Fribourg Navigation Co. v. *Commissioner*, 383 U.S. 272	14
Graham & Foster v. *Goodcell*, 282 U.S. 409	13
Haynes v. *United States*, 353 U.S. 81	10
J. P. Seeburg Piano Co. v. *United States*, 62 Ct. Cl. 281	14
Helvering v. *Winmill*, 305 U.S. 79	14
Mercantile Nat. Bank v. *Langdeau*, 371 U.S. 555	13
Penn Dairies v. *Milk Control Comm'n*, 318 U.S. 261	13
Remington-Rand, Inc. v. *Gage*, 4 F. Supp. 199	14
Sanford, Estate of v. *Commissioner*, 308 U.S. 39	10
Silver v. *New York Stock Exchange*, 373 U.S. 341	13

286-239—67

Cases—Continued

	Page
Sims v. *United States*, 252 F. 2d 434, affirmed, 359 U.S. 108	10
Thermo King Corp. v. *United States*, 354 F. 2d 242	2, 3, 9, 13
U.S. Alkali Assn. v. *United States*, 325 U.S. 196	13
United States v. *Borden Co.*, 308 U.S. 188	13
United States v. *Calamaro*, 354 U.S. 351	10
United States v. *Jefferson Electric Co.*, 291 U.S. 386	13
United States v. *Leslie Salt Co.*, 350 U.S. 383	14
United States v. *Zacks*, 375 U.S. 59	13
Universal Battery Co. v. *United States*, 281 U.S. 580	4, 6, 8
Statutes:	
Internal Revenue Code of 1939, as amended (26 U.S.C. 1952 ed):	
Sec. 3403(c)	12
Sec. 3403(e)	12
Sec. 3404	12
Sec. 3442	12
Sec. 3443 (a)(1)(A)	12
Sec. 3443(d)	12
Sec. 3444(a)(1)	12
Sec. 3444(a)(2)	12
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 4061	2, 4, 26
Sec. 4061(a)	6, 26
Sec. 4061(b)	6, 12, 26
Sec. 4220	12
Sec. 6416 (b)(3)	12
Sec. 6416(c)	12
Revenue Act of 1918, Sec. 900, c. 18, 40 Stat. 1122	4

Statutes—Continued

	Page
Revenue Act of 1921, Sec. 900, c. 136, 42 Stat. 291	4
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 606	6, 9
Sec. 608	7, 9
Revenue Act of 1941, c. 412, 55 Stat. 687:	
Sec. 544	11, 12
Sec. 545	12
Sec. 546	11
Sec. 553	12
Miscellaneous:	
S.T. 523, XI–2 Cum. Bull. 477 (1932)	8
Treasury Regulations 47 (Revenue Acts of 1918, 1921, 1924), Articles 15 and 16	7
Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code), Sec. 40.4061(b)–2 (26 C.F.R. (1961 Rev.) 40.4061(b)–2)	2, 5, 27

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES, PETITIONER

v.

U.S. THERMO CONTROL CO. AND THERMO KING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix A, *infra*, pp. 17–25) is reported at 372 F. 2d 964.

JURISDICTION

The decision of the Court of Claims was entered on February 17, 1967 (App. A, *infra*, p. 17). On May 17, 1967, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Section 4061 of the Internal Revenue Code of 1954 imposes an excise tax on the sale of truck parts and accessories, and the Treasury Regulations, which this Court has upheld, have long defined these products as including any article which is primarily adapted for use in connection with a truck. The question presented is whether the Court of Claims erred in holding that truck refrigeration units which this definition in terms covers are exempted from the tax by implication.

STATUTE AND REGULATIONS INVOLVED

Section 4061 of the Internal Revenue Code of 1954 and Section 40.4061(b)–2 of the Treasury Regulations (1954 Code), are printed in Appendix B, *infra*, pp. 26–28.

STATEMENT

Respondent[1] manufactures refrigeration equipment specifically designed for installation in trucks and truck trailers used for the transportation of frozen foods and other perishables. During the three-year period here in question (1959–1962) respondent sold truck refrigerator units through 200 dealers throughout the United States, collecting and remitting to the government more than $2,500,000 in automotive excise taxes thereon. *Thermo King Corp.* v. *United States*, 354 F. 2d 242, 245 (Ct. Cl.). Respondent then sued for a refund of this tax. In a prior decision rendered in December 1965, relating to seven

[1] Thermo King is the successor to U.S. Thermo Control and, therefore, they will be referred to in the singular.

1961–1962 sales involving $1,500 in tax (Pltf. Ex., p. 12), the Court of Claims (one judge dissenting) granted summary judgment for respondent, relying heavily on its conclusion that "At no time during the period 1932 up to 1945, did the Bureau of Internal Revenue ever assert that truck or trailer refrigeration units were subject to the tax on automotive parts and accessories." 354 F. 2d 242, 246. On petition for rehearing the government presented evidence that, contrary to the court's finding, the Internal Revenue Service had, since 1932, consistently collected the automotive tax on truck refrigeration units (App. A, *infra,* pp. 19–20; Pltf. Exs., pp. 57–90). Rehearing was denied without opinion, and, because of the unsatisfactory state of the record, the government did not seek review in this Court.

In the instant case, involving more than $2,500,000, which was brought while the first suit was pending, the government made a complete record, introducing (1) an affidavit from the chief of the excise tax branch stating (United States Cross Motion for Summary Judgment, p. 5) that "the rulings of the Revenue Service from 1932 to date have consistently * * * held that truck and trailer refrigeration units or equipment, primarily designed for that purpose, are taxable as automobile and truck parts or accessories" and (2) a series of ruling letters issued between 1932 and 1955 so holding (Pltf. Exs., pp. 57–90). Although the court recognized that its conclusion in the earlier case as to the Service's practice "is no longer correct" (App. A, *infra,* p. 20), it

nevertheless granted summary judgment for respondent (two judges dissenting), again holding that Congress did not intend the tax on truck parts and accessories to cover truck refrigeration units.

REASONS FOR GRANTING THE WRIT

This case presents a significant question in the administration of the federal excise tax—whether truck refrigeration equipment has been exempted from the tax on truck "parts or accessories"—and the affirmative answer of the Court of Claims will involve more than $50 million in taxes. Since all members of the industry affected may sue in that court, there is no likelihood that a conflict of decisions on the point will develop.

From 1919 to the present (except for a four-year period from 1928 to 1932), Congress has imposed an excise tax on the sale of trucks, "including * * * parts or accessories therefor sold on or in connection therewith" (now at a 10 percent rate), and a tax on the sale of truck "parts or accessories" sold separately (now at an 8 percent rate).[2] More than 35 years ago this Court, in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 584, unanimously upheld Treasury Regulations which interpreted the substantially identical language of the Revenue Acts of 1918 and 1921[3] to mean that "articles primarily adapted for use in motor vehicles are to be regarded as parts

[2] See 1954 Code, Section 4061 (App. B, *infra*, p. 26); Revenue Act of 1918, Section 900, c. 18, 40 Stat. 1122.

[3] Section 900, c. 18, 40 Stat. 1122; Section 900, c. 136, 42 Stat. 291.

or accessories of such vehicles * * *."[4] There can be no question—and, indeed, respondent has never denied—that respondent's truck refrigeration units constitute "parts or accessories" under this settled broad interpretation of the statutory language.

The Court of Claims held, however, that by implication in 1932 or 1942 a single product—truck refrigeration units—had been exempted from the excise tax on automotive parts and accessories, and that, although the tax had been collected on such units from 1932 to date without contest by anyone, the implied exemption had been carried forward into the Internal Revenue Code of 1954. But exemptions from statutory coverage by implication are not favored (see below, p. 13), and we submit that such an exemption cannot be found unless it is shown that Congress explicitly and knowingly provided it. As we demonstrate below, no such showing has been made. On the contrary, the available evidence on the point indicates that Congress intended the general tax to cover *all* automotive parts and accessories except for those it specifically excepted—and it did not except truck refrigeration units.

The Court of Claims' holding, if allowed to stand, will result in the loss to the government for a 10-year period of more than $50 million in excise taxes on truck refrigeration equipment.[5] Moreover, the court's

[4] The present regulations are somewhat broader but the differences are not relevant for the purposes of this case. See Treasury Regulations (1954 Code), Section 40.4061(b)-2 (App. B, *infra*, p. 27).

[5] The Treasury estimates that this case will govern the collection of at least $50 million in tax on truck refrigeration

approach in finding an implied excise tax exemption for an article that falls squarely within the language of the taxing structure is likely to lead to extensive litigation with regard to the scope and interpretation of other excise taxes. In the circumstances, review by this Court is plainly warranted.

In reaching its decision the Court of Claims relied on three principal lines of reasoning, each of which is erroneous:

1. The Revenue Act of 1932 imposed a 2 percent tax on the sale of truck parts and accessories (Revenue Act of 1932, § 606, 47 Stat. 261–262) and a 5 percent tax on the sale of "[h]ousehold type refriger-

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units during the period 1963 to 1972. In 1972 the tax on trucks and truck parts and accessories will drop from their present levels of 10 and 8 percent, respectively, to 5 percent, Section 4061 (a) and (b) (App. B, *infra*, pp. 26–27); thus, even after 1972 tax collections on truck refrigeration units will exceed $2.5 million per year.

The $50 million figure includes both the 10 percent tax on truck refrigeration units sold on or with a truck and the 8 percent tax on such equipment sold separately for installation on an existing truck. Although the instant decision deals only with the latter tax, the principle on which it rests—that Congress has impliedly exempted truck refrigeration units from the tax on truck parts and accessories—applies equally to both taxes, and the Service therefore intends to treat them the same. Section 4061(a) taxes trucks "including * * * parts or accessories therefor sold on or in connection therewith" at 10 percent and Section 4061(b) taxes "parts or accessories * * * for" trucks at 8 percent. In the *Universal Battery* case this Court commented that "the words 'parts' and 'accessories' have the same meaning in" both subsections (281 U.S. at 582). Thus the instant decision will prevent the government from collecting any excise tax on truck refrigeration equipment, whether sold along with a truck or separately.

ators" (Revenue Act of 1932, § 608). Without citing any legislative history or other specific evidence of legislative intent, the Court of Claims ruled that Congress' enactment of the 5 percent tax on household type refrigerators in itself demonstrated an intent to exempt all commercial refrigeration equipment from any tax, and it stated that if Congress had intended to tax refrigeration equipment designed and adapted for use on trucks, "it is reasonable to conclude that such a change of intent would have been clearly expressed in that part of the [1932] Act covering auto parts and accessories" (App. A, *infra*, p. 22). These conclusions are without support and are erroneous.

The legislative history of the Revenue Act of 1932 contains absolutely no indication that Congress, by imposing a 5 percent tax on household type refrigerators, intended completely to exempt all other refrigeration equipment from all tax. In fact the legislative history sheds no light on why the 5 percent tax was limited to "[h]ousehold type refrigerators"—although one can speculate that Congress may have wished, by this section, to impose a higher special tax on what was then perhaps viewed as a luxury item. Nor does the legislative history indicate that Congress at any time considered the applicability of the 2 percent automotive parts and accessories tax to truck refrigeration equipment, which was apparently at an early stage of development at that time.[6] The Regulations which had been in force from 1919 until Congress repealed the automotive tax in 1928[7] clearly

[6] See Pltf. Exs., pp. 4–6, 19, 24.

[7] Treasury Regulations 47 (Revenue Acts of 1918, 1921, 1924), Articles 15 and 16.

taxed any article which was designed and primarily adapted for installation on a truck, and this Court had upheld these Regulations in *Universal Battery* only two years before, *i.e.*, in 1930.

Thus, when Congress reinstated the automotive tax in 1932, using language identical to the pre-1928 tax and expressing no intention to change the meaning of parts or accessories, it is logical to assume that refrigeration units specifically designed and adapted for installation on trucks, like any other article designed and adapted for such use, were covered.

2. The Court of Claims also relied heavily on a ruling of the Internal Revenue Service published in October, 1932, which read as follows (S.T. 523, XI–2 Cum. Bull. 477 (1932)):

> Advice is requested relative to the application of section 608 of the Revenue Act of 1932 [the household refrigerator tax] to household type of refrigerators and refrigerator components.
>
> Refrigerator parts or units, designed primarily and solely used for commercial purposes, are exempt from tax. These include ice cream cabinets, ice cream cabinet units, water coolers, lens chillers, and refrigerating units for commercial transportation equipment. * * *

The court interpreted this ruling as holding that all commercial refrigeration units were exempt from all excise taxes and implied that Congress, by later reenactments of the Code, had accepted this position (App. A, *infra*, p. 21).

As the published ruling itself makes clear, it was rendered in answer to a specific request "relative to

the application of section 608 of the Revenue Act of 1932," which was the 5 percent tax on household type refrigerators. The ruling did not purport to deal with the applicability of Section 606 of the 1932 Revenue Act (the 2 percent automotive tax) to the relatively few refrigeration units or equipment which were then being designed and adopted for use on trucks. Thus, the ruling held only that commercial refrigerators were exempt from the tax imposed by Section 608,[8] not that they were exempt from all excise taxes.

Less than three months later (*i.e.*, on December 30, 1932), when the Service was specifically asked about the applicability of the automotive tax to truck refrigeration equipment, it replied "that a refrigerator which is designed and primarily adapted for use in an automobile truck is taxable as an automobile accessory" (Pltf. Exs., p. 60). Between 1932 and the present the Service has consistently ruled that truck refrigeration units are covered by the automotive tax.[9]

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[8] As Judge Davis stated in his dissent in the earlier case (354 F. 2d at 252):

"This ruling answered an inquiry as to the incidence of the household-refrigerator tax—nothing else—and the statement that *commercial* refrigerators 'are exempt from tax' meant only that such machines were exempt from the particular tax (*i.e.*, the household refrigerator duty) about which questions had been raised. There is no intimation that the Service was announcing, though not asked to do so, that no excise tax of any nature applied, or could apply, to the enumerated articles."

The commercial transportation equipment referred to in the ruling did not necessarily refer to equipment primarily designed for trucks, since refrigeration units were then also being made for trains and ships. (See Pltf. Exs., pp. 4–6, 19–24).

[9] United States Cross Motion for Summary Judgment, pp. 3–7; Pltf. Exs., pp. 57–90.

As Judge Davis commented in his dissenting opinion (App. A, *infra*, p. 24);

> [I]t is now absolutely clear, to me, that the Internal Revenue Service has always treated these automotive refrigerators as within the "parts and accessories" tax. This is shown by the 18 or so private rulings (stretching from 1932 to the 1950's) now properly before us, as well as by the affidavit of the Chief of the Excise Tax Branch * * *. The 1932 Ruling S.T. 523, pertaining solely to the household refrigeration tax, is quite irrelevant. * * *[10]

Moreover, there is no indication that Congress, in reenacting the Code, either misread the 1932 published ruling dealing with the scope of the refrigerator (not the automotive) tax, or, indeed, even knew that the ruling existed.[11]

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[10] As Judge Davis also noted in his dissent, the few rulings in which the Service concluded that particular refrigeration equipment was not subject to the automotive tax turn on the fact that the Service found that the equipment was not primarily designed for use on trucks (United States Cross Motion for Summary Judgment, pp. 6–7; Pltf. Exs., pp. 85–89). Thus, contrary to the majority's statement (App. A, *infra*, p. 20), those rulings are not inconsistent with the Service's uniform interpretation of the automotive tax.

[11] Even if the ruling could reasonably be read to mean what the Court of Claims said it meant, there is no justification for imputing to Congress approval of such a construction of the law when (a) the ruling was neither formally approved nor promulgated as a regulation by the Secretary of the Treasury, (b) the claimed construction has been repeatedly and consistently rejected by the Internal Revenue Service, and (c) there is no evidence that the ruling was ever brought to the attention of Congress—a not surprising fact since the industry had been collecting the tax from its customers without contest for at least 20 years. Cf. *United States* v. *Calamaro*, 354 U.S. 351, 359; *Sims* v. *United States*, 252 F. 2d 434, 437–439 (C.A. 4), affirmed, 359 U.S. 108; *Haynes* v. *United States*, 353 U.S. 81, 85; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 48–50.

3. Finally, the court below placed heavy emphasis on a 1941–1942 legislative development. In 1941 Congress broadened the scope of the household refrigerator tax to cover commercial refrigerators and raised the rate from 5 to 10 percent. At the same time Congress raised the tax on automotive parts and accessories from 2 to 5 percent.[12] Then in 1942 Congress again limited the refrigerator tax to those of the household type. Based upon these 1941–1942 changes in the refrigerator tax and without any legislative history to support its view, the Court of Claims concluded "that the 1942 repeal of the 1941 tax on Commercial Refrigeration" demonstrated that Congress meant to exempt all commercial refrigeration units from any tax, and the court promulgated the following general rule (App. A, *infra*, pp. 23–24):

> [Where] an article [is] subject to tax under a specifically applicable provision, *viz*, [the 1941–1942 tax on commercial] refrigerators or refrigerator units, where there was at the same time a more general provision argued as applicable [the tax on truck parts and accessories], and the provision to which the article was specifically subject is repealed, the article does not become taxable under the more general provision *in the absence of an explicit statement of Congressional purpose that it be so taxable.* [Emphasis in original.]

During the period 1941–1942, when both the 10 percent refrigerator tax and the 5 percent automotive parts and accessories tax were in effect, the

[12] Revenue Act of 1941, Sections 544 and 546, c. 412, 55 Stat. 687, 711, 713.

Service studied the question of which tax should be imposed on truck refrigeration units. It concluded that Congress intended only the 5 percent automotive tax to apply and it so ruled on at least five separate occasions (Pltf. Exs., pp. 67–71).[13] Thus, the 1942 repeal of the 10 percent tax on commercial refrigerators had no effect on the tax status of truck refrigeration equipment.[14]

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[13] Automobiles and trucks frequently contain numerous items—such as radios, clocks, tires, light bulbs, refrigeration equipment, etc.—which might be taxed either under special taxes on such items or under the automotive tax. It would be difficult to compute the excise taxes due on the sale of a car or truck if numerous items had to be separately valued and taxed at various rates. Therefore, Congress has traditionally made an explicit statement in the statute when it wished an automotive part or accessory (such as radios and tires) to be taxed separately under a special tax. See, *e.g.*, 1939 Code, Sections 3403 (c) and (e), 3442 (last sentence), 3443(a)(1)(A); 1954 Code, Sections 4061(b), 4220, 6416 (b)(3) and (c). For example, in the Revenue Act of 1941 itself Congress specifically provided for taxation of automobile radios at the higher rate applicable to radios, and exempted automobile radios—whether sold along with an automobile or separately—from the lower tax on automotive parts and accessories. Internal Revenue Code of 1939, Section 3404, as amended by Section 545 of the Revenue Act of 1941, c. 412, 55 Stat. 687; Sections 3403 (c) and (e), 3442, 3443(a)(1)(A), and 3444(a)(1) and (2) of the 1939 Code, as amended by Sections 544 and 553 of the Revenue Act of 1941, *supra*.

[14] The lower court commented that during 1941–1942 respondent paid tax at the 10 percent rate and the Service has not offered to refund the difference between the 5 percent tax the Service claims was applicable and the 10 percent tax respondent actually paid (App. *infra*, p. 19). However, the Code clearly prohibited respondent from obtaining a refund of excise taxes which it has collected from its customers unless it obtained a waiver from them or agreed to refund to them any recovery (Internal Revenue Code of 1939, Sec. 3443(d);

Moreover, even if during 1941–1942 the Service should have been collecting the 10 percent refrigerator tax rather than the 5 percent automotive tax, repeal of the higher tax in 1942 would (as the dissenting opinion in the first case recognized) cause truck refrigeration units "again [to] bec[o]me taxable at the lower rate of the parts-and-accessories tax"; certainly repeal of the one-year tax on commercial refrigerators had not "carved out, *for all time,* these machines from the automotive tax" (354 F. 2d at 251; emphasis in original).[15] Thus, the lower court's holding that "the 1942 repeal of the 1941 tax on Commercial Refrigeration ended [respondent's] tax liability" (App. A, *infra,* p. 24) violates the oft recognized principle of construction that repeal by implication is not favored absent an unavoidable repugnancy between two statutes. See *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 424–426; *United States* v. *Borden Co.,* 308 U.S. 188, 198; *United States* v. *Zacks,* 375 U.S. 59, 67–68.[16]

United States v. *Jefferson Electric Co.,* 291 U.S. 386). Respondent has never complied with these statutory prerequisites (Pltf. Exs., pp. 48–49).

[15] Judge Davis also said (*supra,* at 253):

"The refrigeration tax was the higher (10%, rather than 5%) and doubtless Congress would desire it to be the one collected. To the extent of the overlap, the automotive tax, at 5%, would therefore remain in abeyance—suspended, quiescent. When the overlay disappeared with the abandonment of the refrigeration tax in 1942, the lesser tax would revive and become effective once more. * * *"

[16] See also *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357; *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555; *U.S. Alkali Assn.* v. *United States,* 325 U.S. 196, 206; *Penn Dairies* v. *Milk Control Comm'n,* 318 U.S. 261, 275.

The two cases upon which the Court of Claims relied are

In sum, neither Congress' imputed knowledge and approval of a 1932 ruling (which on its face did not provide any broad exemption from all excise taxes and which the Service did not view as doing so), nor the enactment and repeal in 1941–1942 of the short-lived tax on commercial refrigerators, provides any basis for concluding that when Congress enacted the 1954 Code, it intended to create or continue an implied exemption from the broad general terms of the automotive excise tax for the single item of truck refrigeration equipment. If anything should be imputed to Congress, it would be adoption and approval of the long standing Treasury Regulation, which this Court upheld in 1930, interpreting the identical statutory language as covering all automotive parts and accessories.[17]

Certainly, if Congress had been persuaded in 1932

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inapposite. In *United States* v. *Leslie Salt Co.*, 350 U.S. 383, there had long been a documentary stamp tax on "bonds, debentures, or certificates of indebtedness" and another tax at a lower rate on "promissory notes." The Treasury Regulations had, over a long period of years, consistently interpreted the phrase "certificates of indebtedness" as including only those that were akin to "bonds" and "debentures," not mere promissory notes which were subject to the lower tax. The Court found clear evidence that Congress had also understood the two taxes as mutually exclusive, and held that repeal of the lower tax on promissory notes did not subject such instruments to the higher tax on bonds, debentures and certificates of indebtedness. In *J. P. Seeburg Piano Co.* v. *United States*, 62 Ct. Cl. 281, the Court held only that a tax on "automatic slot-device vending machines" did not extend to coin-operated pianos. But see *Remington-Rand, Inc.* v. *Gage*, 4 F. Supp. 199, 200 (W.D.N.Y.).

[17] Cf. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Fribourg Navigation Co.* v. *Commissioners*, 383 U.S. 272, 283.

or 1942 to exempt truck refrigeration equipment from the truck excise tax, the members of the affected industry could hardly have been unaware of it until 1963 when Thermo King first brought suit. But in the 24 years since 1942 the automotive tax has received the specific attention of Congress by amendment on more than 15 different occasions without evidence of any complaint by anyone as to the taxing of truck refrigeration equipment and without the slightest hint of Congressional disapproval of the Treasury Regulations which cover such equipment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

PHILIP R. MILLER,
Attorney.

JUNE 1967.

APPENDIX A

In the United States Court of Claims

(Decided February 17, 1967)

No. 271-65

U.S. THERMO CONTROL CO. v. THE UNITED STATES

No. 272-65

THERMO KING CORPORATION v. THE UNITED STATES

Daniel M. Gribbon, attorney of record, for plaintiff. *William H. Allen*, *L. E. Kust* and *Robert F. Pugliese*, of counsel.

Philip R. Miller, with whom was *Assistant Attorney General Mitchell Rogovin*, for defendant. *Lyle M. Turner*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

These are suits for recovery of excise taxes paid by U.S. Thermo Control Company for the period July 1, 1959 through August 12, 1961, and by Thermo King Corporation for the period August 14, 1961 through June 30, 1962 in the aggregate amount of $2,538,175.09.

Plaintiff Thermo King Corporation is successor in interest to plaintiff U.S. Thermo Control Company, and is the same party as plaintiff in *Thermo King Corporation* v. *United States*, 173 Ct. Cl. 860, 354 F. 2d 242 (1965), reconsideration denied March 18, 1966. The facts there alleged are the same except for differences in periods and amounts of tax involved. The case again comes before us on cross motions for summary judgment, supported by the same affidavits and exhibits supplied in the former case, and one additional affidavit for defendant. None of defendant's arguments herein raises questions that have not been fully considered by the court, and dismissed by the court's prior opinion and order on reconsideration in favor of plaintiff.

The question again presented is whether during this period the manufacture and sale of mechanical refrigeration units, designed to be mounted in truck and trailer bodies to be operated from the trucks' own power and used to provide refrigeration for the commercial transportation of perishable products and frozen foods, were subject to the manufacturers' excise tax on automobile and truck parts and accessories imposed by section 4061(b) of the Internal Revenue Code of 1954.

The Revenue Act of 1932 imposed an excise tax upon parts and accessories for automotive vehicles, including trucks. 47 Stat. 261–262. The same statute imposed an excise tax on household-type refrigerators and components, but not on commercial refrigeration. *Ibid* at 263–264. In the year of enactment of the 1932 statute, the Bureau of Internal Revenue ruled publicly that "refrigerator parts or units, designed primarily and solely used for commercial purposes" (including "refrigerating units for commercial transportation equipment") "*are exempt from tax.*" S.T. 523, XI–2 Cum. Bull. 477 (1932). [Emphasis supplied] By Revenue Act of 1941 the excise tax on refrigeration was increased from five to ten percent, and broadened to apply, in the words of the House Ways and Means Committee, "to all mechanical refrigerators and refrigerating units, whether of household or other type." H.R. Rep. No. 1040, 77th Cong., 1st Sess. 49 (1941). The automotive parts and accessories tax was broadened by the 1941 Act to include parts and accessories for truck-trailers and trailers as well as trucks, and was made a five percent tax. The Revenue Act of 1942, enacted thirteen months later, re-

turned the refrigeration tax to a tax only on household-type units and components by repealing the tax on commercial refrigeration. No relevant change was made in the automotive parts and accessories tax provision.

Plaintiff began manufacturing units designed to refrigerate trucks and trailers in 1939. It paid no excise tax on them until the Revenue Act of 1941 became effective. It paid the ten percent refrigeration excise tax on its sales of truck refrigeration units during the life of the tax on commercial refrigeration—1941 and 1942. In 1945 a Revenue Service agent auditing plaintiff's returns for the period 1940–45 concluded that the units it manufactured were subject throughout the period to the automotive parts and accessories tax. Defendant asserted liability for a tax so determined.[1]

This court held in the first *Thermo King* case, *supra*, that plaintiff's units were subject to the commercial refrigeration tax and, following *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956), and *J. P. Seeburg Piano Co.* v. *United States*, 62 Ct. Cl. 281 (1926), concluded that "the 1942 repeal of the 1941 tax on Commercial Refrigeration ended plaintiff's tax liability under the facts in this case * * *." *Thermo King*, *supra*, at p. 875.

Defendant, in urging the court to depart from its former decision, has relied almost completely upon the same alleged facts, the same legal argument and the same private rulings of the Internal Revenue Service that it presented in support of its petition for reconsideration in the first case.

In addition, defendant has submitted an affidavit of Mr. Bernard H. Fischgrund, Chief of the Excise Tax Branch, Miscellaneous Tax Division in the office of the Assistant Commisioner, Technical Internal Revenue Service, who states that private rulings have consistently held that truck and trailer refrigeration units were subject to the automotive parts and accessories tax. This affidavit adds nothing new to the force of the rulings already reviewed on reconsideration of the first decision.

In the first *Thermo King* case, the court concluded that "[a]t no time during the period 1932 up to 1945, did the Bureau of Internal Revenue ever assert that truck or trailer

[1] The agent did not recommend and defendant did not concede any refund of the difference between the five percent automotive tax and the ten percent refrigeration tax for the 1941–42 period in which plaintiff paid the latter tax.

refrigeration units were subject to the tax on automotive parts and accessories under the regulations * * *." *ibid*, at 867. Although the conclusion was correct on the basis of all the alleged facts then before the court, it is no longer correct in the basis of the private rulings and affidavits now presented to us.

Defendant's failure to produce these private rulings earlier is due to the fact that, although their existence was known, the Bureau of Internal Revenue did not want to disclose them at the first trial and consented only after the court's adverse decision. This peculiar piece-meal presentation of known facts now requires that this court again plow the same furrow. However, we are by no means persuaded that these rulings evidence the consistency of Bureau interpretation ascribed by the affidavit of Branch Chief Fischgrund. While they all appear to deal with refrigeration equipment primarily designed for use with refrigerator bodies on trucks or trailers, none of them are of the same type as plaintiff's units and some of the rulings are completely inconsistent. For example, among the documents are private rulings by the Internal Revenue Service on vacuum cold plates and accessories sold by the Dole Refrigerating Company for use with truck or trailer units. On March 21, 1947, the Internal Revenue Agent advised this company that under a private ruling dated March 13, 1947, manufacturers' sales of such articles were *not* subject to the tax on auto parts or accessories under § 3403(c) of the Internal Revenue Code. On April 1, 1955, eight years later, this same truck refrigeration equipment was found to be subject to this identical tax, even though there had not been any relevant change in the tax statute.

On August 3, 1938, a communication from the Commissioner of Internal Revenue to the Collector in Dallas, Texas, made reference to private rulings issued on April 20 and May 11, 1936 which held "that a certain refrigerating unit and an electrical power system manufactured and sold by the Kold-Hold Manufacturing Company, Lansing, Michigan and the Century Electric Company, St. Louis, Missouri, respectively are not subject to tax either under the provisions of section 606(c) or section 608 of the Revenue Act of 1932." (The auto parts and accessories excise tax and the domestic mechanical refrigerator tax).

Nevertheless, the Commissioner in this communication issued a new private ruling making these same Kold-Hold units taxable as auto parts. The reason given for this reversal by the Internal Revenue Service was that, upon reconsideration, it was found that these refrigeration units were primarily designed for use on automobile trucks or other automobiles. This fact also clearly appears in the former rulings holding that the same units were not taxable.

Whatever the effect of these selected, but tenuous and inconsistent samplings of private rulings by the Internal Revenue Service may be, they are clearly inconsistent with the official public ruling issued by the Bureau shortly after the enactment of the Revenue Act of 1932 and which is cited in the prior *Thermo King* decision, at p. 863:

> Advice is requested relative to the application of section 608 of the Revenue Act of 1932 [the household refrigerator tax] to household type of refrigerators and refrigerator components.
>
> Refrigerator parts or units, designed primarily and solely used for commercial purposes, *are exempt from tax*. These include ice cream cabinets, ice cream cabinet units, water coolers, lens chillers, and *refrigerating units for commercial transportation equipment.* * * * (S.T. 523, XI-2 Cum. Bull. 477 (1932)). [Emphasis supplied]

We do not ascribe to the words "exempt from tax" in the Internal Revenue Service's official publication the limited meaning ascribed to them by defendant, *i.e.*, that these words refer only to the tax on household refrigeration. The Bureau is not given to such an ineptly phrased limitation of the plain language in its rulings. It would hardly have been necessary for the Bureau to issue such an official public document in order to merely announce the obvious conclusion that a commercial refrigeration unit for trucks was exempt from a tax on household refrigerators.

On the contrary, this official public ruling by the Bureau followed the existing intent of Congress as reflected in the enactment of the Revenue Act of 1932. In enacting section 608 of the 1932 Act, Congress reviewed the entire scope of excise taxation for mechanical refrigeration. And at the same time, in enacting section 606, Congress also reviewed the entire scope of excise taxation for automobile parts and accessories.

The intent of Congress was to limit the five percent excise tax on mechanical refrigeration to household or domestic type mechanical refrigeration and to exempt commercial refrigeration. Having exempted the sale of these units from the mechanical refrigeration tax, if Congress had intended to then tax their sale under the same Act at two percent as auto parts or accessories, it is reasonable to conclude that such a change of intent would have been clearly expressed in that part of the Act covering auto parts and accessories inasmuch as the Act was intended to clarify, not to obscure, the entire scope of taxation of mechanical refrigeration and auto parts as two clearly separate tax areas.

We turn now to the 1941 Revenue Act where Congress again reviewed the scope of taxing these two separate areas—mechanical refrigeration and auto parts and accessories. Again, the crucial point is the intent of Congress. The 1941 Act increased the excise tax on mechanical refrigeration to ten percent and was broadened to include commercial as well as household refrigeration. In the words of the House Ways and Means Committee (cited in our earlier opinion at p. 863), the new ten percent tax was to apply to "*all mechanical refrigerators and refrigerating units*, whether of household or other type." [Emphasis supplied.] There was no assertion before Congress in 1941 of any private rulings that these same refrigerating units had previously been taxable as auto parts; on the contrary, there was the official public ruling by the Bureau, quoted *supra*, that they were previously exempt from tax. At the same time, and as a part of the same 1941 Revenue Act, the automotive parts and accessories for truck-trailers as well as for trucks was increased to five percent.[2]

Congress also dealt specifically with a wide variety of items that could reasonably have been previously regarded as taxable as auto parts or accessories. A new tax on electric light bulbs was imposed but, recognizing that some bulbs were already taxable as automotive accessories, see S.T. 501, XI-2 Cum. Bull. 473 (1932), Congress specifically provided that they should continue to be so taxed. Revenue Act of 1941, § 551, 55 Stat. 717, enacting Int. Rev. Code of 1939, § 3406 (a) (10); see H.R. Rep. No. 1203, 77th Cong., 1st Sess. 16

[2] Like the 1932 Revenue Act, the Act of 1941 was intended in part to clarify and not to obscure the entire scope of the taxation of mechanical refrigeration and of auto parts and accessories as two clearly separate areas of taxation.

(1941). With respect to radios, Congress provided that all radios, even those that had previously been taxed as automotive accessories, see S.T. 643, XII–1 Cum. Bull. 397 (1933), should thenceforth be taxed as radios. Revenue Act of 1941, §§ 544(b), 545, 55 Stat. 712, 713, amending Int. Rev. Code of 1939, §§ 3403(c), 3404(a); see H.R. Rep. No. 1040, 77th Cong., 1st Sess. 32 (1941). Similarly, fare registers and fare boxes for buses and taxis that had previously been taxed as automotive accessories, see S.T. 606, XI–2 Cum. Bull. 476 (1932), were made taxable as business machines, Revenue Act of 1941, § 551, 55 Stat. 717, enacting Int. Rev. Code of 1939, § 3406(a)(6), and "not as automobile accessories." S. Rep. No. 673, 77th Cong., 1st Sess. Pt. I at 52 (1941).

Any potential overlap between the tax on automotive accessories and the new 1941 taxes was specifically resolved by Congress. And if Congress thought that there was any possible overlap between the new ten percent tax on "all mechanical refrigeration units" and the existing tax on auto accessories, it would have resolved this problem by specific language as it did with lamps, radios, and fare registers.

Section 614 of the Revenue Act of 1942, 56 Stat. 978, repealed the ten percent excise tax on commercial refrigeration, leaving in effect only the tax upon household type refrigerators. As we said in the prior opinion, at p. 872:

> The 1942 Act was not a repeal by implication of the tax on auto parts or accessories, as applied to plaintiff's units, which had never been taxable or taxed under this section since 1932; it was an express repeal of the tax on commercial refrigeration equipment to which plaintiff's units had been previously and solely subject. No discriminatory exemption to plaintiff from the automotive parts or accessories tax results from the 1942 Act, and all of plaintiff's competitors in the manufacture and sale of truck refrigeration units are in the same legal position.

We again adhere to the following:

> Under the doctrine established in *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956), and *J. P. Seeburg Piano Co.* v. *United States*, 62 Ct. Cl. 281 (1926), an article subject to tax under a specifically applicable provision, *viz*, refrigerators or refrigerator units, where there was at the same time a more general provision argued as applicable, and the provision to which the article was specifically subject is repealed, the article does not become taxable under the more general provision,

in the absence of an explicit statement of Congressional purpose that it be so taxable. *ibid.* at p. 873.

Since defendant has offered nothing new in the present case that would in any way answer the basic question, also present in the first *Thermo King* case, as to the intent of Congress in the enactment of all of the legislation involved, we adhere to our former decision.

We conclude, as in the former case, that the 1942 repeal of the 1941 tax on Commercial Refrigeration ended plaintiff's tax liability under the facts in this case and that plaintiff is entitled to recover.

Plaintiff's motion for summary judgment on the petition is granted, and defendant's cross motion is denied. Plaintiff is entitled to recover on its petition, and judgment is entered to that effect. The amount of recovery will be determined under Rule 47(c) of the Rules of this court.

DAVIS, *Judge*, dissenting:

I reiterate, without repeating, my views as set forth in *Thermo King Corp.* v. *United States*, 173 Ct. Cl. 860, 876, 354 F. 2d 242, 251 (1965), and add only that it is now absolutely clear, to me, that the Internal Revenue Service has always treated these automotive refrigerators as within the "parts and accessories" tax. This is shown by the 18 or so private rulings (stretching from 1932 to the 1950's) now properly before us, as well as by the affidavit of the Chief of the Excise Tax Branch that "the rulings of the Revenue Service from 1932 to date have consistently, as distinguished from some occasions, held that truck and trailer refrigeration units or equipment, primarily designed for that purpose, are taxable as automobile and truck parts or accessories within the meaning and intent of the applicable provisions of the Revenue laws * * *."[1] The 1932 Ruling S.T. 523, pertaining solely to the household refrigeration tax, is quite irrelevant. See 173 Ct. Cl. at 877–78, 354 F. 2d at 252. In the face of the sweep of the legislative words in the "parts and accessories" tax, of the breadth of the long-standing regulations, and of the uniform practice of the administrators for over 30 years, I cannot agree that these units, alone of all

[1] The qualification, "primarily designed for that purpose", explains the few alleged inconsistencies which the court finds in the course of rulings. The Service came to different conclusions, depending in part on the facts presented to it, as to whether particular devices were "primarily" designed for automotive use.

automobile parts and accessories, have been freed by Congress (except for the single year 1941–1942) from all excise tax.

NICHOLS, *Judge*, joins in the foregoing dissenting opinion.

APPENDIX B

Internal Revenue Code of 1954:

SEC. 4061. IMPOSITION OF TAX.

(a) *Automobiles.*—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

(1) [as amended by Sec. 203 of the Highway Revenue Act of 1956, c. 462, 70 Stat. 388] Articles taxable at 10 percent, except that on and after October 1, 1972, the rate shall be 5 percent—

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck and bus trailer and semitrailer chassis.
Truck and bus trailer and semitrailer bodies.
Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

* * * * *

(b) *Parts and Accessories.*—There is hereby imposed upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for

which so sold, except that on and after July 1, 1965, the rate shall be 5 percent.

* * * * *

[26 U.S.C. 4061.]

Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code):

SEC. 40.4061(b)–2 *Definition of parts or accessories.*

(a) *In general.* The term "parts or accessories" includes (1) any article, the primary use of which is to improve, repair, replace, or serve as a component part of an automobile truck or bus chassis or body, or other automobile chassis or body, or taxable tractor, (2) any article designed to be attached to or used in connection with such chassis, body, or tractor to add to its utility or ornamentation, and (3) any article, the primary use of which is in connection with such chassis, body, or tractor, whether or not essential to its operation or use. * * * The term "parts or accessories" includes all articles which have reached such a stage of manufacture as to be commonly known as parts or accessories whether or not fitting operations are required in connection with their installation.

* * * * *

(d) *Examples of articles taxable as parts or accessories.* Examples of articles which are taxable as parts or accessories are: Automobile air conditioners, baby seats for automobiles, automobile beds, automobile hammocks, automobile clutches, bottle warmers and heating pads designed to operate from an automobile cigarette lighter, automobile radio antennae, automobile license plate frames, automobile clocks, automobile mirrors and mirror brackets, purses for carrying parking meter coins or cases for carrying registration cards when designed for

attachment to an automobile; safes primarily designed for use in taxable motor vehicles; electric bulbs primarily designed and adapted for use on automobiles, automobile floor mats; jacks of the mechanical or hydraulic bumper, screw, ratchet, scissors, or other type primarily designed to be carried as accessories in automobiles as distinguished from jacks designed especially for use in garages and repair shops; dollies of the type commonly known as converter dollies which are used as connectors to convert semitrailers to full trailers; tool kits recommended for use with automobiles, automobile seat covers of any construction whether they are ready-made or custom fitted, and fitted truck top covers.

* * * * *

[26 C.F.R. (1961 Rev.) Sec. 40.4061(b)-2.]

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SUPREME COURT, U. S.

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No. 255

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES, *Petitioner*

v.

U.S. THERMO CONTROL CO. and

THERMO KING CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

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July 1967

TABLE OF CONTENTS

	Page
Question Presented	1
Statement	2
Statutes and Ruling	3
Reasons for Denying the Writ	4
Conclusion	13
Appendix	1a

INDEX TO CITATIONS

Cases:

United States v. *Leslie Salt Co.*, 350 U.S. 383	4, 5, 6
Van Norman Industries, Inc. v. *United States*, 361 F.2d 992 (1966), cert. denied, 386 U.S. 981 (1967)	6

Statutes:

Excise Tax Reduction Act of 1965, 79 Stat. 136	7
Revenue Act of 1932:	
Section 606, 47 Stat. 261-62	2
Section 608, 47 Stat. 263-64	2
Revenue Act of 1941:	
Section 544, 55 Stat. 711	2
Section 545, 55 Stat. 712	9
Section 546, 55 Stat. 713	2, 7
Section 550, 55 Stat. 717	8, 9
Revenue Act of 1942:	
Section 614, 56 Stat. 978	2

Legislative Materials:

H.R. Rep. No. 1040, 77th Cong., 1st Sess. (1941)	8, 9
H.R. Rep. No. 1203, 77th Cong., 1st Sess. (1941)	8
S. Rep. No. 673, 77th Cong., 1st Sess. (1941)	8, 9

Rulings:

Revenue Ruling 58-563, 1958-2 Cum. Bull. 892-93	11
Revenue Ruling 63-160, 1963-2 Cum. Bull. 489	12
Revenue Ruling 63-23, 1963-1 Cum. Bull. 206-10	3
S.T. 523, XI-2 Cum. Bull. 477 (1932)	7, 10
S.T. 643, XII-1 Cum. Bull. 397 (1933)	11

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Where Congress has consistently treated refrigeration equipment and automotive equipment as separate objects for imposition of the manufacturers excise tax, was it error for the court below to conclude that repeal of the tax on commercial refrigeration, without reservation or exception, meant that refrigerating systems used with trucks and trailers were not to be taxed as automotive parts or accessories?

STATEMENT

In 1932 Congress imposed manufacturers excise taxes upon automotive equipment and upon refrigeration equipment. The former applied to automotive vehicles including trucks and to parts and accessories as well; the rate was 2 per cent. 47 Stat. 261-62.[1] In 1941 this tax was broadened to include trailers and truck-trailers and their parts and accessories; the rate was increased to 5 per cent. 55 Stat. 711.

The tax on refrigeration when first imposed in 1932 was limited to household refrigerators and components and did not extend to commercial refrigeration equipment; the applicable rate was 5 per cent. 47 Stat. 263, 264. In 1941 this tax was extended to commercial refrigeration of all kinds, and the rate was increased to 10 per cent. 55 Stat. 713. In 1942 Congress eliminated the tax on commercial refrigeration and returned to the pattern of 1932, taxing household refrigerators only. 56 Stat. 978.

Respondent began in 1938 to manufacture refrigerating systems for use with all kinds of transportation equipment.[2] Such systems are self-contained and provide complete cooling for trucks, trailers, trains and ships; they are made, sold and serviced by a separate industry, entirely apart from companies engaged in manufacturing or servicing transportation equipment. (Pltf. Ex. pp. 5-6, 9, 19).

Respondent paid no excise tax on its refrigerating systems until 1941. So long as the tax on commercial

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[1] An earlier excise tax on automotive vehicles had been repealed in 1928.

[2] All firms in the line of succession of the present Thermo King Corporation are referred to in this brief collectively as "respondent."

refrigeration, enacted in 1941, remained in effect respondent paid a tax at the 10 per cent rate on its entire production. After the tax on commercial refrigeration was repealed, the Commissioner of Internal Revenue asserted that those systems manufactured by respondent that were used on trucks and trailers were subject to tax as automotive "parts or accessories." (Pltf. Ex. p. 14). This action was brought to recover taxes paid by respondent in subsequent years pursuant to the direction of the Internal Revenue Service.

The court below held upon analysis of the relevant statutes and administrative rulings that, in view of the consistent action of Congress in treating automotive and refrigeration equipment as separate objects of excise taxation, the effect of the repeal of the tax on commercial refrigeration was to relieve all such equipment from tax rather than to subject some systems to tax under the catch-all "automotive parts and accessories." The first decision of the court below in respondent's favor is reported at 354 F.2d 242 (1965), and the second is in Appendix A to the petition.

STATUTES AND RULING

There are set out in the Appendix (1) the relevant portions of the statutes that imposed an excise tax on household refrigeration in 1932, extended the tax to commercial refrigeration in 1941 and repealed the commercial refrigeration tax in 1942, and (2) Revenue Ruling 63-23, the most recent and comprehensive listing by the Internal Revenue Service of categories of articles taxable as automotive parts or accessories, which does not include mechanical refrigeration systems.

REASONS FOR DENYING THE WRIT

The decision below resolves a narrow question of statutory construction concerning the excise tax treatment of refrigerating systems used in trucks and trailers. Neither in result nor in rationale does it raise any general questions as to the scope and interpretation of the excise tax statutes. It is not, and is not claimed to be, in conflict with any decision of this Court or any other court, and such effect as it may have upon the revenue is not great and is subject to the overriding will of Congress. Moreover, the decision is a plainly correct application of the principle expounded by this Court in *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956): that, in the absence of an indication of congressional intention to the contrary, repeal of a statutory provision specifically subjecting an article to tax terminates the taxability of that article even though there remains in effect a more general taxing provision to which the article might otherwise be arguably subject. There is no warrant for review by this Court.

1. The court below found that the pattern of congressional action taxing commercial refrigeration equipment used in transportation was this: Between 1932 and 1941 refrigeration systems for trucks and trailers were not subject to any excise tax. The tax on refrigerators was limited to household refrigerators, and the automotive parts and accessories tax did not reach commercial refrigeration units. In 1941 an excise tax was imposed on commercial refrigerating equipment, including equipment used with trucks and trailers. That tax was repealed in 1942, and the automotive parts and accessories tax was not changed in any relevant respect. Applying this Court's decision in *United*

States v. *Leslie Salt Co.*, *supra*, to this pattern of congressional action, the court below held that truck and trailer refrigerating systems were relieved from taxation by the repeal of the taxing provision specifically applicable to them and, in the absence of any expression by Congress, were not caught up in the more general parts and accessories provision.[3]

The concern of the court below was entirely with the statutory provisions to which we have referred, and with them only to the extent that they dealt with the taxability of commercial transportation refrigerating systems. The considerations underlying the answer to the question with which the court was confronted were intricate, as can be seen from its two opinions. Analysis of Internal Revenue Service rulings and legislative history as well as the language of several versions of the relevant statutory provisions was called for. But the decision based on that analysis has no application to other excise tax problems, even other problems arising under the automotive parts and accessories tax provision. This was demonstrated by a recent decision of the court below concerning the applicability of the parts and accessories tax to auto-

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[3] In *Leslie Salt*, following the elimination of the excise tax on "promissory notes" this Court refused to permit the Commissioner to tax certain instruments as "certificates of indebtedness" under a provision that remained in effect after repeal of the tax on promissory notes. As an initial matter, the instruments in question could readily have been comprehended within the phrase "certificates of indebtedness," but they clearly were promissory notes, and the Court considered itself obliged to give effect to Congress' decision to repeal the tax on promissory notes. Here effect is given to the decision to repeal the tax on commercial refrigeration only if respondent's units are freed from tax and not subjected as an afterthought to another tax that survived repeal of the commercial refrigeration tax.

mobile radio antennas. There the court, ruling in favor of the Government, made clear that the decision in this case rests solely upon the special circumstances presented by the actions of Congress relating to the excise tax on refrigeration equipment. *Van Norman Industries, Inc.* v. *United States,* 361 F.2d 992 (1966), *cert. denied,* 386 U.S. 981 (1967).

Certainly, therefore, there is no substance to the contention of the Government that the court below took a novel approach to the problem it faced, characterized variously as finding an "implied exemption" from excise taxation or a repeal by implication (Pet. pp. 2, 5, 13, 14), that "is likely to lead to extensive litigation with regard to the scope and interpretation of other excise taxes." (*Id.* p. 6). There is no exemption or repeal by implication in this case. What is involved rather is the express repeal of the statutory provision specifically taxing an article and the consequence of such a repeal so far as possible continued taxability of the article under another previously inapplicable provision is concerned.[4] The principle of decision in such cases was laid down by this Court in *United States* v. *Leslie Salt Co., supra.* So far as we are aware, that decision has not produced extensive litigation.

The only other reason assigned by the Government for presenting the question here as one warranting review by this Court is its assertion that the decision, if allowed to stand, will result in the loss to the Government of something like $5 million a year in excise taxes.

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[4] "This does not, then, appear to be the kind of problem created by the repeal of a tax on an article and the possible application of another, more general, tax that we recently faced in Thermo King Corp. v. United States . . . ." Van Norman Industries, Inc. v. United States, *supra* at 997.

To make this loss sound more impressive the Government projects it over a ten-year period ending in 1972. (Pet. pp. 4, 5 and n.5). But before any revenue loss of such magnitude can occur Congress will have had ample opportunity to amend the statute and thereby to express its dissatisfaction with the decision below if it believes that by that decision its will has been contravened. *Cf.* Excise Tax Reduction Act of 1965, 79 Stat. 136.

2. The court below was plainly correct in finding the pattern of congressional action that it did find and on that basis invoking the principle of the *Leslie Salt* case as a guide to its decision here.

(a) There is no doubt that Congress in 1932 originally elected to limit the tax on refrigeration equipment to household equipment, in 1941 decided to extend it to commercial refrigeration including equipment of the type manufactured by respondent, and in 1942 reconsidered and returned to a tax limited to household refrigerators. (App. pp. 1a-2a).

The 1932 Act, by its terms, was limited to "household type" refrigerators. And the Commissioner, contemporaneously with that enactment, ruled unequivocally that units "designed primarily and solely used for commercial purposes are exempt from tax." S.T. 523, XI-2 Cum. Bull. 477 (1932). In 1941 the intention of Congress to tax all kinds of commercial refrigeration was as plainly manifested as its intention in 1932 to exempt such equipment from tax. The report of the Ways and Means Committee states:

> Under existing law the tax on mechanical refrigerators applies only to those of the household type and components and parts thereof. *Under the bill this tax will apply to all mechanical*

refrigerators and refrigerating units whether of household or other type. (Emphasis supplied.) H.R. Rep. No. 1040, 77th Cong., 1st Sess. 32 (1941). See also *id.* at 55; S. Rep. No. 673, 77th Cong., 1st Sess., Pt. I at 49 (1941).

The view of these enactments that the petition takes depends essentially upon acceptance of the proposition that, when Congress dealt with commercial refrigeration, deciding whether to tax it or not, it intended in each instance to exclude from consideration equipment that could be used with automotive vehicles. According to the petition, Congress exercised its power to tax such equipment in 1932 when it imposed a tax on automotive parts and accessories and thereafter never had such equipment in mind when it legislated with respect to commercial refrigeration. (Pet. p. 8). There is no evidence that this was the intention of Congress and considerable evidence that, whenever Congress wished to classify as an automotive accessory an article having independent tax significance, it made its intention explicit.

That evidence is in the Revenue Act of 1941, the Act that added commercial refrigeration and other products to the excise tax rolls and raised rates on yet other articles to produce additional revenues to meet defense needs. Where Congress recognized that to some extent certain products to be taxed for the first time or at increased rates were already taxed as automotive accessories, it resolved all possible conflict. To the extent that light bulbs, newly added to the excise tax rolls, were put to automotive use they were to continue to be taxed as accessories, 55 Stat. 717; see H.R. Rep. No. 1203, 77th Cong., 1st Sess. 16 (1941); car radios,

ruled administratively to be accessories, were to be taxable as radios at 10 per cent and not as accessories at 5 per cent, 55 Stat. 712, 713; H.R. Rep. No. 1040, 77th Cong., 1st Sess. 32 (1941); and fare registers and boxes, newly subject to taxation by name, were to be taxed as business machines, not as automotive accessories, 55 Stat. 717; S. Rep. No. 673, 77th Cong., 1st Sess., Pt. I at 52 (1941).

Congress' failure to deal with commercial refrigeration in the way in which it dealt with other accessories provides convincing evidence that it acted in the belief that all commercial refrigeration, including truck and trailer refrigeration, was free of tax by virtue of its 1932 action and would become subject to tax only by virtue of its 1941 action. Similarly, when Congress in 1942 abandoned the tax on commercial refrigeration, its failure to state that certain types of such equipment would become taxable as an automotive accessory is persuasive evidence that such a result was not intended.

(b) Support for the view that refrigerating systems used in trucks and trailers are properly taxable as automotive parts or accessories and not as commercial refrigerating equipment is found only in selected private rulings issued by the Internal Revenue Service. Since these utterances have never been brought to the attention of Congress, and the issue here is solely one of ascertaining the intention of Congress, they are irrelevant. That, indeed, was the view of the Government when the issue was first presented to the court below. It was only after a decision in respondent's favor that the Internal Revenue Service dug into its files and found some correspondence in which it had asserted that some types of refrigeration useful

in automotive vehicles were taxable as accessories.[5] Had the Service made those views known to the Congress in either 1941 or 1942 the question raised in this case might well be in a different posture. Having decided to keep its views to itself—as it originally did in the court below—the Service can hardly, in good conscience, ask that it now be assumed that Congress not only knew of, but actually adopted, those views.

When Congress first imposed an excise tax on refrigeration equipment in 1932, extended it to commercial equipment in 1941 and subsequently repealed the latter action in 1942, there was no evidence presented to it, or publicly available, that the Revenue Service was of the view that "commercial refrigeration" excluded systems used on automotive vehicles. Indeed, the only relevant public statement of position by the Service clearly pointed in the opposite direction. In acknowledging, as noted above, that commercial refrigeration was exempt under the 1932 Act, the Service included among the exempt items "refrigerating units for commercial transportation equipment." S.T. 523, XI-2 Cum. Bull. 477 (1932). What it meant to say, the Government now urges, was that such units were nonetheless taxable as automotive accessories. Perhaps this is not the only occasion on which the Service has publicly announced, without qualification, that a product was "exempt from tax" when, in fact, it was of the view that the item was subject to tax under another section of the same Revenue Act under

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[5] It was the Government's decision to put the issue to the court below without the benefit of this correspondence that accounts for what it now calls "the unsatisfactory state of the record" in the first case. (Pet. p. 3).

consideration. It must however be an exceedingly rare example.[6]

Quite apart from this "ambiguity" in its only published ruling and its failure to inform Congress of the truncated meaning it attached to the term "commercial refrigeration," the record of the Service in applying the automotive accessories tax to refrigerating systems has been neither so consistent nor so long-standing as the petition suggests.[7] Respondent did not pay, and the Service made no contemporaneous effort to collect, the automotive accessories tax in the period before 1941. Moreover, the Service collected and kept the tax respondent paid under the commercial refrigeration tax in 1941-42 at the 10 per cent rate. (Pltf. Ex. p. 49). It was long after that tax had been repealed that Service representatives discovered the accessories tax, and even then they took no action to return the overpayment that was due respondent.[8]

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[6] Substantially contemporaneously, the Service ruled that automobile radios, while not taxable under Section 607 of the 1932 Act as "receivers," were taxable under Section 606 of the same Act as automotive accessories. S.T. 643, XII-1 Cum. Bull. 397 (1933).

[7] Even the rulings selected for submission to the Court do not show the consistency claimed by the petition. (Pet. p. 9). As the court below observed, "we are by no means persuaded that these rulings evidence the consistency of Bureau interpretation ascribed by the affidavit of Branch Chief Fischgrund." (Pet. p. 20).

[8] The suggestion that respondent's failure to produce consents from its customers justified the action of the Service is completely without merit. (Pet. p. 12). The Service has long recognized that such consents may be, and ordinarily are, produced after the right to a refund has been established. Rev. Rul. 58-563, 1958-2 Cum. Bull. 892, 893.

The Treasury Regulations defining automotive parts and accessories are unusually detailed and specific in listing examples of articles comprehended thereunder. (Pet. p. 27). While they include purses for carrying parking meter coins that sell for a few cents, they unaccountably fail to mention refrigerating systems that sell for thousands of dollars.[9] Even when the Service, "in order to provide guidance" in response to "numerous inquiries," undertook as late as 1963 to amplify and supplement the list of parts and accessories found in the Regulations, it again unaccountably failed to recognize mechanical refrigerating systems. (See Appendix pp. 3a-10a). Some fifty-five distinct categories of items were listed, but no mention was made of refrigerating systems of the kind manufactured by respondent and others. It was not until after the publication of that comprehensive list and after the commencement of this litigation that the Service for the first time publicly ruled that such systems were automotive parts or accessories. Rev. Rul. 63-160, 1963-2 Cum. Bull. 489.

Thus, on the public record the decision of the court below that commercial refrigeration had been treated by Congress as a subject of taxation separate from automotive parts and accessories is clearly right, and the private materials belatedly advanced by the Government do not impinge upon its correctness. In no sense do they reflect on the conclusion that Congress elected to treat all refrigeration equipment as a discrete object of excise taxation, rather than leaving some portion of it for treatment under the automotive catch-all that encompasses auxiliary items such as ashtrays, baby seats and tool kits. (See Pet. pp. 27-28).

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[9] As the petition notes, the tax alone on the seven units involved in the first decision in respondent's favor totaled some $1,500. (Pet. pp. 2-3).

CONCLUSION

The decision of the court below, which faithfully applies the relevant decisions of this Court and is in conflict with no decision, is a just and rational resolution of a narrow question of statutory construction that raises no significant question in the administration of the tax laws. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1967

APPENDIX

Section 608 of the Revenue Act of 1932, 47 Stat. 263, provided:

> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 5 per centum of the price for which so sold:
>
> "(a) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor sold on or in connection therewith or with the sale thereof).
>
> "(b) Cabinets, compressors, condensers, expansion units, absorbers, and controls (hereinafter referred to as 'refrigerator components') for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus. . . .

It became Section 3405 of the Internal Revenue Code of 1939, 53 Stat. 412, which was amended by Section 546 of the Revenue Act of 1941, 55 Stat. 713, to read:

> "There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which so sold:
>
> "(a) REFRIGERATORS, ETC.—Refrigerators, beverage coolers, ice cream cabinets, water coolers, food and beverage display cases, food and beverage storage cabinets, ice making machines, and milk cooler cabinets, each such article having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline.

"(b) REFRIGERATING APPARATUS. — Compressors, condensers, evaporators, expansion units, absorbers, and controls, for, or suitable for use as part of, or with, a refrigerating plant, refrigerating system, refrigerating equipment or unit, or any of the articles enumerated in subsection (a).

"(c) AIR-CONDITIONERS.—Self-contained air-conditioning units.

"(d) COMPONENTS.—Cabinets, compressors, condensers, fans, blowers, heating coils, cooling coils, filters, humidifiers, and controls, for, or suitable for use as part of, or with, any of the articles enumerated in subsection (c)."

Section 614 of the Revenue Act of 1942, 56 Stat. 978, amended Section 3405 of the 1939 Code to read:

"There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which sold:

"(a) REFRIGERATORS.—Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline.

"(b) REFRIGERATING APPARATUS.—Cabinets, compressors, condensers, evaporators, expansion units, absorbers, and controls for, or suitable for use as parts of or with, household type refrigerators of the kind described in subsection (a) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus.

"(c) AIR-CONDITIONERS.—Self-contained air-conditioning units."

1963-1 Cum. Bull. 206-10

26 CFR 40.4061(b)-2: Definition of parts or accessories. Rev. Rul. 63-23

Summary lists of rulings relating to the taxability of articles as automobile "parts or accessories" under section 4061(b) of the Internal Revenue Code of 1954.

Numerous inquiries have been presented to the Internal Revenue Service regarding whether various articles are subject to the manufacturers excise tax which is imposed by section 4061(b) of the Internal Revenue Code of 1954 upon automobile "parts or accessories" sold by the manufacturer, producer, or importer thereof.

Section 40.4061(b)-2 of the Manufacturers and Retailers Excise Tax Regulations provides that, in general, the term "parts or accessories" includes—

(1) any article, the primary use of which is to improve, repair, replace, or serve as a component part of an automobile truck or bus chassis or body, or other automobile chassis or body, or taxable tractor,

(2) any article designed to be attached to or used in connection with such chassis, body, or tractor to add to its utility or ornamentation, and

(3) any article, the primary use of which is in connection with such chassis, body, or tractor, whether or not essential to its operation or use.

The regulations further provide that the term "parts or accessories" includes all articles which have reached such a stage of manufacture as to be commonly known as parts or accessories whether or not fitting operations are required in connection with their installation.

In order to provide guidance in the uniform application of this tax, there are set forth below brief descriptions of some of the articles which have been held taxable or non-

taxable, as indicated, but which are not specifically covered by previously published rulings.

Articles Held to be Taxable as Automobile Parts or Accessories:

Air brake system, safety valve, designed for use on taxable motor vehicles.

Air conditioner, mounted on two wheels, designed to be pulled behind a passenger automobile for the purpose of providing conditioned air through a hose extending from the air conditioner to the interior of that automobile.

Air conditioners, equipped with internal combustion engines, designed for installation on bus bodies.

Ammeters designed for use as replacement parts in particular models of automobiles.

Arresters which are designed to be attached to automobile exhaust pipes for the purpose of providing protection from exhaust sparks.

Ash trays, equipped with dashboard mounting brackets, window molding clips, and upholstery pins, suitable for installing anywhere in an automobile.

Ash trays, equipped with suction cups for mounting, which are advertised as "a universal ash tray, for use in car, office, or home," but which are primarily used in automobiles.

Battery cable kit (consisting of copper cable, clamp ends, battery bolts and nuts, and crimping die set) designed for use with taxable motor vehicles. However, no tax applies to crimping die set if selling price is stated separately on invoice.

Belts, referred to as "V-belts," designed for use as component parts of automotive air brake systems and

which are attached to the fan and generator pullies to drive the air compressors of the systems.

Bracket, custom-made, designed for installation on the inside of an automobile truck body for the purpose of carrying a long handled shovel.

Bushings designed for use in automobile suspension rear support arms.

Cigarette "snuffer," designed for extinguishing lighted cigarettes, primarily used in automobiles and trucks.

Clamp, "U" type, designed, advertised, and sold for use as a universal-type automobile muffler and tailpipe clamp, even though the clamp may be used for other purposes.

Clothes hanger and ice scraper combination designed to be attached to the window glass of an automobile.

Condensers, compressors, and evaporators which are designed for use as replacement parts for automobile air conditioners.

Connectors, electrical, with brass screws, used primarily on small boat trailers.

Covers and bows for jeep tops, whether sold separately or as complete tops.

Crane, of the boom and mast type, which is designed to be mounted permanently on an automobile truck chassis immediately behind the cab for use in loading and unloading the vehicle on which it is mounted.

Curtains (such as tail gate, chain gate, and side curtains) designed to be attached to or used in connection with taxable trucks even though they may be used for other purposes.

Front suspension repair kit (consisting of a washer, a tapered helical spring, and a cup with spring nest)

designed to maintain uniform tension on the ball joint, for front end alignment of an automobile.

Fuel pressure regulators primarily used on automobiles, trucks, buses, and taxable tractors.

Heater cores designed for automobile and automobile truck heaters.

"Hydraulic lifting fifth wheel" designed to be mounted on a truck tractor for use in moving semitrailers.

Implement lift, designed for installation on, or as an attachment to, "jeep" vehicles, for hydraulically raising or lowering equipment which is operated by, or with, the vehicles.

Litter bag designed to be hung on an automobile dashboard or door.

"Loading yokes" designed to be used in connection with cable reel trailers and combination pole and reel trailers.

Luggage carriers designed to be placed on the roof of an automobile or truck.

Overhead meat tracking systems designed for use with automobile truck or trailer bodies.

Pin-brake shoe anchor (eccentric) designed for use on taxable motor vehicles.

Pressure mechanisms which are designed to be attached to the stem of an inner tube for the purpose of indicating pressure fluctuations.

Rack, designed to be hung on the seat of an automobile, for carrying guns or fishing rods.

Rack which is custom-made for installation on the rear of an automobile truck body for the purpose of carrying acetylene containers.

Radiator guards designed to be attached to or used in connection with taxable motor vehicles.

Rear view mirrors, referred to as "caboscopes", specially designed to be attached to trucks to enable the driver to view operation of an aerial extension ladder.

Refrigeration "holdover" plates designed for use in taxable truck or trailer bodies; also, hangers designed for use in fastening and holding the plates to the interior of the truck or trailer bodies.

Resonator repair kit, for installation on tailpipe of taxable motor vehicles.

Retractable caster wheel devices designed for use on two-wheel utility trailers, whether sold with or without the wheel.

Safety switches designed for use in electrical systems of automobiles, trucks, and buses.

Shock absorber anchor plate kits used in repair of taxable automobiles.

Sirens, electronic, designed to be attached to or used in connection with taxable motor vehicles.

Sleeves for automobile clutch throw-out bearing assemblies.

"Spreader gate" designed and sold for use on dump trucks.

Starter jumper wire combination, designed for use in starting taxable motor vehicles.

Steering arm and ball stud assemblies designed for use in the steering mechanisms of taxable motor vehicles.

Steering arm shaft designed for use on taxable motor vehicles.

Stop lights and tail lights designed for use on boats being transported over the highways.

Sun visor cases designed to be attached to the visors of automobiles for holding eye glasses, cigarettes, papers, parking meter change, etc., even though also held out to be worn on a person's belt.

Tail gate loader designed for use on taxable motor vehicles.

Tailpipe repair and extension kit for use on taxable motor vehicles.

Tie-down strap devices designed to hold loads to the tops of automobiles or trailers.

Tire valves, and tire valve extensions, designed for tires used on taxable motor vehicles.

Transmission countershaft designed for use with taxable motor vehicles.

Truck reflectors and clearance lights designed for use with taxable vehicles.

Vacuum indicators designed for use on vacuum systems of taxable vehicles.

Wheel balancing weights designed for use with taxable motor vehicles.

Articles Held to be Not Taxable as Automobile Parts or Accessories:

Air conditioners equipped with electric motors and designed for installation only on trolley cars or trackless trolley buses.

Ammeters for general use, such as on tractors, boats, stationary engines, lighting plants, etc.

Caps designed to seal lubrication fittings on various types of equipment, including automotive equipment.

Chemical solution used to desulphate automobile storage batteries.

Chemical solution used to prevent air leaks in all types of pneumatic tires.

Connectors, electrical, designed for marine use.

Fuel tanks designed for use only on farm equipment.

Gauges, designed to measure temperature, pressure, vacuum, or liquid level in marine engines, stationary engines, industrial machines, aircraft, farm equipment, etc.

Heaters designed for use only on the premises of drive-in theaters.

Ignition condensers designed for use only on power lawn mowers, chain saws, outboard and marine motors, etc.

Ladder ring assemblies designed to support aerial extension ladders mounted on trucks.

Marine starter switches.

Pole clutching device which is a component part of a derrick and digger used in the utility industry to set telephone line poles.

Rear-view mirror designed for use on motorcycles, motor scooters, and bicycles.

Spark plug wrench sets.

Tachometer used to measure the speed of rotation on nonautomotive equipment, such as marine engines, stationary engines, industrial machines, aircraft, farm equipment, etc.

Tire pressure gauges, applied externally to check the air pressure of tires.

Tire valve cores and caps, when sold separately.

Transmissions suitable for use only on nontaxable construction equipment.

Welding units, electric, mounted on trucks or other vehicles and driven by the engines of those vehicles but which perform no function in connection with the operation of the vehicles.

The above lists are intended to provide general information as to Internal Revenue Service rulings affecting a variety of articles related to the automotive field. The conclusions reached may not be applicable in situations where the articles in question are not identical with those described. Accordingly, where any question exists as to the applicability of the above rulings to sales of specific products, advice should be sought from the Internal Revenue Service.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 255

UNITED STATES, PETITIONER

v.

U. S. THERMO CONTROL CO. AND
THERMO KING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

Respondents' entire argument rests upon an erroneous assumption as to the basic scope of the two excise tax provisions involved in this case. Their major premise, explicitly or implicitly reiterated throughout the brief in opposition (pp. 1, 2, 3, 4, 6, 7, 8, 9, 10, 12), is that in 1932 Congress levied two separate and mutually exclusive categories of excise taxes: one upon "automotive equipment" and the other with re-

spect to "refrigeration equipment" (Brief in Op. p. 2). From this premise they argue that because since 1932, except for the single year 1941-1942, Congress has limited the "tax on refrigeration" (Br. in Op., p. 2) to household type refrigerators, truck refrigeration equipment has remained wholly exempt from excise taxation (except for that year).

As we demonstrated in the petition, however, the premise is unsound. Congress in 1932 did not create the dichotomy which respondents ascribe to it. Congress imposed a broad two percent excise tax upon automotive "parts and accessories"—a phrase substantially identical to that in earlier revenue acts which this Court only two years before, in effect, had held to cover "articles primarily adapted for use in motor vehicles * * *" (see *Universal Battery Co.* v. *United States*, 281 U.S. 580, 584)—and also imposed a five percent tax upon a specific product: household refrigerators. But it did not thereby create another broad category of taxable products—"refrigeration equipment"—which excluded truck equipment. Neither the language of the 1932 legislation nor its legislative history suggests—let alone establishes—that by imposing a separate tax upon household refrigerators, Congress intended to exempt other refrigeration equipment from the lesser tax on automotive "parts and accessories." Respondents do not deny that if the latter words are given their normal meaning, they are just as applicable to truck refrigeration equipment as to any other equipment designed for truck use; and since there is no indication that Congress did not use

the words in their normal sense, they do cover truck refrigerator equipment—as the Service consistently has held for 35 years (see the petition, pp. 8-10).

There is similarly no basis for the alternative argument that Congress, by extending the tax on household refrigerators to cover commercial ones for a brief period early in World War II, gave truck refrigeration equipment a complete exemption from the lesser excise tax upon automotive parts and accessories when, a few months later, it again limited the tax on refrigerators to the household variety.

Indeed, if Congress ever intended to single out refrigeration equipment for an exemption from the general excise tax on automotive parts and accessories, it is difficult to comprehend why it never said a word to that effect, or why the industry failed to claim such an exemption for as long as 30 years.

Respectfully submitted.

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AUGUST, 1967

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